United States Supreme Court

October Term.

No. 286.

THE CITY OF NEW ORLEANS, BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, AND GEORGE B. PENROSE, TREASURER OF THE CITY OF NEW ORLEANS, APPELLANTS.

vs.

MARY G. T. STEMPEL (WIFE OF EDWARD STEMPEL), GUARDIAN OF THE INFANTS FANNIE TOBIN McCANN, ET AL.

Pleadings.

Mrs. Mary G. T. Stempel, claiming to be guardian of the minors McCan, filed a bill of equity in the United States Civil Court, Eastern District of Louisiana, asking an injunction against the City Treasurer of New Orleans, to restrain him from enforcing the collection of taxes on the assessments in the name of estate of D. C. McCan, for the year 1896, on money in possession, $15,000—and money loaned, bills receivable, etc., $800,000, and asks judgment against the Board of Assessors to cancel the assessments.

She says that these children, by judgment of the Civil District Court, were recognized as the sole heirs of the father

and mother, Mr. and Mrs. D. C. McCan, and as such placed in possession of their property. She avers that after these judgments were rendered, and while the assessment rolls for 1896 were exposed, there appeared on said rolls in the name of the estate of D. C. McCan an $800,000 and an $15,000 assessment, that she applied to the Board of Assessors for its cancellation for the reasons:

1st. That the children aforesaid had been set in possession of the property so inherited by them from the estate of D. C. McCan, aud to whom the same now belongs, and by which said estate terminated and had ceased to exist.

2nd. That she and her wards were all residents and citizens of the State of New York; that under the Constitution of the United States, etc., the power of taxation is limited to persons, etc., within the jurisdiction of the State, and that debts have their situs with the creditor.

She alleges that the Board of Assessors refused to comply with her request, and that in turn she applied to the City Council, which also refused.

She claims that the City Treasurer is trying to enforce the collection of taxes based on erroneous assessments, and she says that the greater part of this assessment is based upon City and State bonds which are not taxable, and any tax upon them would impair the obligation of the contract, which, when issued, were declared not taxable.

She claims she has paid all taxes on real estate owned by her wards, and also on personal property for the year 1896.

The answers of the defendants and appellants here was briefly stated, a general denial, except in so far as the facts alleged in complainants' bill. On these pleadings the case went to trial in the Court *a qua*, and judgment was rendered,

the opinion being delivered orally, perpetuating the injunction and cancelling the assessments. From that judgment this appeal has been taken by the respondents and defendants.

EVIDENCE.

The evidence shows that Mrs. Stempel is the guardian of these children; that the successions of Mr. and Mrs. McCan were opened and closed in the Civil District Court, and on March 14th, 1896, a judgment was recorded in the Conveyance Office recognizing these children as heirs and placing them in possession as such. It also shows that they paid their taxes on $2500—personal property, in the name of the estate of D. C. McCan; it shows that they made application to the Board of Assessors, as is mentioned in their bill of complaint, and that these applications were refused.

The testimony of Albert Baldwin shows that he is the resident agent of Mrs. Stemple and her children in New Orleans, and as such handles or controls all her business in New Orleans. He says that the bills receivable that were turned over by the estate of McCan to Mrs. Stemple were largely mortgage notes, and he roughly estimated the value of the personal property at $500,000, about $230,000 of which was composed of bonds of the City of New Orleans and State of Louisiana, and that all of the mortgage notes, bonds, etc., are kept in the City of New Orleans at all times, and never sent elsewhere. That 80 per cent. of the mortgage notes held in New Orleans for account of Mrs. Stemple and her children are on property situated in New Orleans, and that all the notes were in New Orleans at the time the assessment was made, to-wit: January to March, 1896.

Consequently, it is a fact, established by Mr. Baldwin's testimony, that the notes and money on which the assessment is made were actually in New Orleans when the assessment was made upon it and always have been.

There is no claim in the bill, or elsewhere, on the part of Mrs. Stemple, for any *reduction* of the assessment. She simply asks that it be cancelled entirely, not alone to an extent sufficient to cover the State and City bonds, which she says are not taxable, but she also asks for a cancellation of the assessment on *all* the money on hand, mortgage notes, loans, and on every kind of personal property in New Orleans belonging to her and her children and controlled by her agent, Mr. Albert Baldwin. The bill admits the payment of the taxes on real estate and on money on deposit, etc., under the assessment in the name of "Estate of D. C. McCan."

The judgment of the lower Court, and the opinion, the latter of which was delivered orally, was based entirely upon the principle, decided by the Court therein, that property such as notes, bonds, etc., although within the jurisdiction of a State, in the hands of an agent for collection and reinvestment could not be taxed by a State through positive enactment. Our opponent now urges here that the assessment is null and void because the assessment was made in the name of the "Estate of D. C. McCan" and not in the name of the heirs who had been put in possession, and because notice had been given to the assessors and Reviewing Board of that fact, and application had been made to correct the assessment accordingly, which had been refused in both instances, and that notice and application had been made within the time and in the manner provided by law. This ground was not urged and argued in the lower Court, nor did the lower Court even allude to it in its

opinion. Had it been urged and argued, and had the lower Court sustained the point, the assessment could and would have been changed so as to stand in the names of the heirs. It cannot prevail here even if it had been alleged in the proceedings, because no such ground is alleged in complainants' bill. In numbers 5 and 6 of of their bill (Trans. pp. 2 and 3) the change of title is mentioned, but no application for correction or change of assessment is sought to be made on the ground of misnomer. But on the contrary it is alleged that the application was made that the assessment "be erased and cancelled and stricken from the rolls" because the property assessed belonged to non-residents, and as such was not assessable or taxable in Louisiana.

And again, because it is shown by the evidence that such was not the purpose and intent of the applications to the Board of Assessors and the Board of Review, the first of which was filed on March 17th, 1896, and the second on April 9th, 1896, and thereafter the taxes on both the real estate, and a portion of the personal property were paid under the assessment in the name of the "Estate of D. C. McCan." Baldwin the agent so testified on p. 23 of the Transcript.

"Q. Have the taxes on the real estate for 1896 all been paid? A. Yes, sir; and also the taxes on the personal property, household furniture."

This demonstrates clearly not only that the intention and demand in the applications was not for a *correction* or *change* of the name in which the assessment was made, but for an entire cancellation, and it also shows that there was an acquiescence or ratification of the assessment as it stood in the name of "Estate of D. C. McCan." In 33 L. A. 818, property was assessed in the name of "Estate of Mrs. R. Jennings" when it should

have been assessed in the name of Mrs. N. R. Jennings or in the name of her heirs. The heirs brought suit to annul certain tax judgments rendered on the defective assessment. On the trial it appeared that an attorney had made application to the Board of Assessors to reduce the assessment, the Court said: "We have felt great doubt as to whether those in the name of 'Estate of Mrs. R. Jennings' should not be saved from nullity by the proceedings taken by the present attorney of the plaintiffs in connection with the assessments. While the rolls were open he filed sworn applications for the reduction, signed 'Estate Mrs. R. Jennings per B. R. Foreman.' If it were clearly proved that, in making these applications he acted by direct authority of the owners, we should regard them as operating a clear ratification of the assessment in that name, which would have estopped them from opposing the assessment or any of the subsequent proceedings thereon." How much stronger does this doctrine appear to apply to the case at bar, when we consider that there was *actual payment by a duly authorized agent*. In 38 L. A. 807, the Court held that an assessment in the name of Geo. F. Sanderson was valid, although Sanderson had been then dead four years, and assigned as one of the reasons for so declaring that it had been assessed to Sanderson "who had paid the taxes thereon for years past." Thus the assessment was maintained, not because, as in the case at bar, the taxes had been paid for the particular year under a wrong name but because they had been paid under similar assessments for prior years. In Reed vs. Creditors, 39 A. 125, in which a syndic attacked the assessments on the insolvent's property for six years back, and on the ground of erroneous assessments, the Court held that having placed the taxes for those years on the bilan or tableau in the insolvent proceedings, and by a proceed-

ing to refer the payment of them to the proceeds of sale "he is completely estopped from urging such an objection" to the assessments, and upheld the assessments. In 42 L. A. 435, the same doctrine was maintained. So in 42 A. 1127 the Court said: "Moreover the act of payment indicates a recognition and adoption of the mode of assessment, which is held to bar subsequent question thereof, Carter vs. City, 33 A. 816; Lane vs. March, Id. 554; Ins. Co. vs. Levi, 42 A. 432." The point involved in 42 A. 1147, was the the same as in the case at bar, that is "that the assessments are null for the years from 1875 to 1888, because made in the names of Fishel & Holmes who were not the owners." We take this to be universal law that abandonment of opposition, acquiescence, and ratification, by payment, of an erroneous assessment is an estoppel against further attack against that assessment. But our opponent argues on p. 4 of his brief that some of the owners here being minors, cannot be estopped by the acquiescence and ratification of their agent. He says "Moreover, the complainants are minors and 'minors cannot be estopped.' Zunts vs. Courcelle, 16 A. 98." The principle in the case cited has no application whatever to the case at bar. In that case two heirs sold their interest in property, which they derived from their parents, and also other rights which they derived from other parties, On the 28th of March, 1846, a Mrs. Segur another of the joint owners sold her portion. This act of sale was never recorded nor did it appear that the note to be given to Mrs. Moussier was ever so delivered. Subsequently Mrs. Segur donated to the minor children of the Moussiers, a certain interest in the property. That act of donation was duly recorded. The Court says: "It is contended by plaintiff that the owners have by their acts and silence been instrumental in deceiving him as

to the non-existence of any title in them. An answer to this that *minors cannot be* so *estopped*." The italics are our own and that our opponent has, inadvertently, quoted the Court as saying that "minors can never be estopped," whereas the Court only says that "minors cannot be *so* estopped," that is under the peculiar circumstances of that case. We can find no rule of law or authority that sanctions any doctrine, even intimating that estoppal will not lie against minors for acts done by the agent of a guardian or tutor, within the strict sphere and scope of his agency, and especially in relation to the question and management of the minors' property in its relation to a sovereign government. Nor do we think any such rule or principle exists, as it would be an extraordinary perversion of all principles, which govern in the law of taxation.

We respectfully submit that there is no force in the I and IV points argued in our opponent's brief and pass on to the real and only question at issue in this case.

The plaintiffs and appellees herein base their action on the doctrine of

MOBILIA SEQUUNTUR PERSONAM,

contending that the personal property, the assessment whereof they contest, belonging to persons residing outside of the State of Louisiana is not liable to taxation, in Louisiana altho' the notes etc., have been made in the State, the mortgages are on property within the State, etc., and actually within the State, in fact have never been outside of the State, since their execution. They do not appear to contest the proposition that the property is fully covered by the tax laws of the State, but contend that being the property of non residents, the State of Louisiana cannot by positive law tax it.

The complainants really base their whole case on the doctrine of

as applicable to them as non-residents, and claim that the Louisiana Statutes are unconstitutional.

The doctrine advanced by our opponents in general terms embraces the principle that the domicile of movable or personal property follows that of the owner, and the laws in force at the domicile of the owner govern the disposition, control and relations of the movable property. The orgin of the doctrine has been traced to the civil law, and its application made according to that law. Judge Story in his Conflict of Laws, 8th Edit., Chap. IX, and Wharton in his Conflict of Laws, 2nd Edit., p. 414, Sec. 334, learnedly discuss its origin and its proper application. Wharton says in Sec. 343: "If we view that law as now applied, we must admit that the tendency of present authority, as has already been shown, is to deny the proposition *in toto;* and to hold on the contrary that all property, movable and immovable, is to be judged of and determined by the *lex rei sitae.*" Story does not go so far as Wharton, but says (note a page 543): "*Mobilia sequuntur personam.* The exceptions to the maxim *mobilia sequuntur personam* have become so numerous that it cannot be safely invoked for the decision of any but the simplest cases at the present day, if ever, indeed, a case can ever be decided upon a maxim." Both these authors agree that the principle will only govern when its invocation does not conflict with the positive law of the State where the movables are actually situated. In other words, that it is a fiction of law, which prevails by comity, and it must yield to positive law.

That the property assessed is covered by the Tax Statutes of the State is indisputable. Section 1 of Act No. 85 of 1888, taxes "all personal property held in trust, or by a wife or minor

child; all property held, controlled or administered in each separate capacity as president, cashier, treasurer, liquidator, assignee, master, superintendent, manager, sequestrator, receiver, trustee, stakeholder, depositary, warehouseman, keeper, curator, tutor, administrator, legatee, heir, beneficiary, father, agent, attorney, usufructuary, mandatory, fiduciary, or official capacity * * * all rights, credits, bonds, stocks, and securities of all kinds, *promissory notes*, open accounts and other obligations; "*all cash on hand*," etc. The italics are our own. The Act 106 of 1890, amending the Act of 1888, provides in Section 1, *ipsissimis verbis* identically the same, and in Section 7, after providing for the assessment of "stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits," further provides that "all this shall apply with equal force to any person, or persons representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself *or through any agent* shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and *all bills receivable, obligations, or credits* arising from business done in this State are hereby declared assessable within this State, and at the business domicile of said non-resident, his agent or representative." The italics are our own. That the Statute covers promissory notes belonging to non-residents, in the hands of an agent resident within the State has never been pointedly adjudicated upon by the Courts of Louisiana, but the Court has intimated several times that promissory notes are constitutionally taxable under it.

LOUISIANA JURISPRUDENCE

It is a singular coincidence that the principle laid down by Story and Wharton, and now generally accepted, was first in

America, applied by the Supreme Court of Louisiana, and was then followed by courts of other States and by the Federal Courts. Both Story and Wharton discuss and approve the Louisiana case, as the leading case. In 4 M. 20, a sale made, at the domicile of the owner in New York, of movables situated in Louisiana, but without delivery, was held not to protect the property from seizure in Louisiana, before delivery, although under the law of New York the sale was complete without delivery. The decision is short and does not include any general reasoning. The doctrine, however, was reaffirmed in 5 M. 23 and 7 M. 24. In these cases the opinions are brief also, and it is only in 2 M. N. S. which reaffirms the prior decisions that the Court enters more fully into the question and declares (p. 99) "nor can the foreigner or stranger complain of this if he sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. *What the law protects it has a right to regulate.*" The italics are the Court's.

The doctrine is repeated in 17 L. 590. In 8 R. 414, the Court said: "We consider the doctrine as well settled now that personal property has no locality, and that the laws of the owner's domicile should in all cases determine the validity of the transfer or alienation, *unless there is some positive or customary law of the country to the contrary*. Story's Conflict of Laws, §383 *et seq.*" See also 24 A. 93, 579; 31 A. 509." The Louisiana cases cited by us refer to the abolition of the application of the maxim by positive law in cases strictly between citizens of our own and other States.

We have, therefore, thus far only examined and discussed the question as to how far the general principle of *mobilia*

sequuntur personam is abolished and done away with in cases where private rights are affected as between citizens of one State and those of another. We think that we have shown conclusively that in this branch of private International law the comity by which the principle is respected will not be allowed to prevail where there is positive law conflicting with the maxim and the application of the maxim would injure or act detrimentally to the interests of the citizens of the State wherein the doctrine was invoked. We now pass on to the larger question under public international law, where the principle would effect the rights and privileges of the State itself, as in cases of

POSITIVE LAWS OF TAXATION,

doing away with the comity on the question.

The jurisprudence of Louisiana will show that the same principle prevails in the public law as in the private law. The legacy tax against foreign heirs and legatees levied by an old law of the State as well as by recent statutes, irrespective of the fact whether deceased was domiciled in the State or not, has been uniformly sustained by our courts, notwithstanding the fact that the legacy consisted of movables, and that immediately on the death of the deceased the ownership vested in the heir upon the principle of *le mort saisit le vif*. 2 A. 667; 9 A. 186; 10 A. 391; 12 A. 577; 13 A. 113.

Our opponents dwelt with some force in the Court below on the Meyer case, 41 A. 646, in which the Court decided that a judgment could only be taxed at the domicile of the owner, for there alone was it located. We do not dispute the correctness of that decision, *under the then existing law, Act 98 of 1886*, for there was nothing in that Act doing away with the principle of *mobilia sequuntur personam*. The Court in that

case especially calls attention to that fact, and says: "Whether it would lie within the the power of the Legislature to direct specifically that judgments belonging to resident creditors should be assessed and taxed in the parish where they are rendered is a question not before us. The statute simply directs that movables shall be assessed where they are located, *and in absence of legislative provision to the contrary, judgments like debts, have their situs at the domicil of the creditor.*" The italics are our own. Thus the decision turns on the then existing law, which in no wise conflicted with the doctrine *mobilia sequuntur personam.* The decision in Paving Company vs. City et als., 41 A. 1017, "is predicated mainly on the revenue act of 1888."

The sections 6, of the Acts of 1885 and 1888, are identical in language, and there can be no question that there were in those sections no provision affecting the doctrine of *mobilia sequuntur personam* and making movable property of non-residents taxable in the State. Both of them were rendered in 1889, the last in December. It was in order to remedy the defect in the then existing law that the amendment to the Statute of 1888 was passed in Act 106 of 1890. Section 7 of this last corresponds literally with section 6 of the former acts, but adds thereto the additional *proviso:* * * * * "And this shall apply with equal force to any person or persons representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident' either by himself or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State and at the business domicile of said non-resident, his agent or representative."

The first case adjudicated involving the new proviso contained in the Act of 1890 is the one in 44 A. 764, in which the question decided was as to the right of the State to tax premiums received, and credits therefor, received by a foreign insurance company. The Court decided that premiums and credits could not be assessed. It was particular to guardedly say, however, "We are dealing exclusively with the question of credits as assessed." It sustained the legality of the tax on "money in possession." In the course of the opinion it says "the Statute must be applied so far as it relates to tangible property belonging to non-residents, and as to them the general rule recognized by the comity of States *mobilia sequuntnr personam* mnst yield." All that was thus decided was that premiums collected for transmission out of the State, and credits could not be taxed. The next case, 44 A. 770, affirmed the same doctrine that mere ordinary debts due to non-residents could not be taxed in Louisiana. The Court, however, here again guarded itself by saying "There is no doubt of the legislative power to modify the rule of comity, *mobilia personam sequnntur personam*, in many respects. Movables having an actual *situs* on the State may be taxed there. *Even debts may assume such concrete form in the evidence thereof that they may be similarly subjected when such evidences are situated in the State*, as in the case of bank notes, public securities, *and possibly of negotiable promissory notes*, bills of exchange on bonds." We italicize in order to call especial attention to the fact that the Court does not decide bonds, promissory notes, etc., due to non-residents, but actually in Louisiana to be non-taxable, but intimates strongly to the contrary that they may be taxable. In 46 A. 1, the Court decided that "moneys standing to the credit of a non-resident firm on the books of a New Orleans firm are not taxable." (Syllabus)

This was the case of a cotton buyer for a foreign firm, who purchased cotton for shipment to his principals in Manchester, Eng. He paid for the cotton by drawing bills of exchange, attaching thereto the bills of lading, sold the bills of exchange to the banks, and occasionully drew clear drafts. In 47 A. 1544, quoting from 15 Wallace 300, the Court further says: "This is the exact illustration that is given by Mr. Burroughs, for he says that when a person who resides in one State, has an agent in another State who loans or invests money for him on notes or other evidences of debt, and then reinvests the proceeds of the loans in the same State, such notes or *evidences of debt are taxable in the latter State.* Burroughs on Taxation, p. 60." The italics are our own.

In 49 A. 43, money belonging to a foreign corporation deposited in bank, and drawn out by an agent in the transaction of its business in New Orleans, was declared by the Court to be taxable. The Court said on p. 48: "We find a Statute of the State, which by its terms brings them under the operation of State and City taxation, and we are bound to give effect to its provisions unless they are in derogation of the Constitution. The unconstitutionality of the Act is not pleaded, and we, ourselves, see no unconstitutional features in it. The rule *mobilia sequuntur personam* is a fiction of the law, not resting upon any constitutional foundation, and which gives way before express laws, destroying it in any given case where constitutional requirements do not stand in the way." Just preceding this passage, which we have quoted, the Court says: "The company transacted business in New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the State and City government which residents received, and

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we see no reason why it should not be taxed, as claimed in this proceeding, unless there be 'insuperable legal objections in the way," thus harking back to the doctrine of Judge Porter in 2 N. S. "What the law protects, *it has a right to regulate.*"

So, in 49 A. 1173, the same principle was again maintained. In the recent case of the Liverpool, London and Globe Ins. Co. vs. Board of Assessors, the Court decided the same issue as in 44 A. 760, but the Court was particularly careful to say, "there is no doubt of the legislative power to modify the rule of *mobilia sequuntur personam* in many respects. We understand that the issue relates to the assessment of 'debts' that were due for premiums." They then quote from 44 A. 770, with approval and reaffirmance, "Even debts may assume such concrete form in the evidence thereof that they may be similarly subjected when such evidences are situated in the State, as in the case of bank notes, public securities, and possibly, of negotiable promissory notes, bills of exchange or bonds."

In that case the Court said: "We understand that the issue relates to the assessment of 'debts' that were due for premiums."

And it cites with approval the decision in 44 A. 767, and says further:

1. "There is no doubt of the legislative power to modify the rule of comity *mobilia sequuntur personam* in many respects."

We submit, therefore, that in so far as the jurisprudence of Louisiana has gone, it never has established the principle that promissory notes actually secured by mortgage on property in Louisiana, executed in the same, and held by an agent therein

for collection and reinvestment for a non-resident owner, are not liable to taxation in Louisiana. But on the contrary, that the Courts have, whenever they have touched upon the subject, distinctly intimated that, under positive laws to that effect, they were so taxable in the hands of the agent where the notes were situated.

THE JURISPRUDENCE OF OTHER STATES.

The proviso of the Louisiana Act of 1890 only puts in force a principle which has long been established in the other States of the Union, and maintained as constitutional. In Alvanly vs. Power, 2 Jones Equity (N. C.) 51, a similar law of North Carolina was sustained. In Catlin vs. Hull, 21 Vt. 161, the same rule was upheld, the Court saying: "Such has been the settled practice in this State, not only in reference to property which is tangible, *but also that which is incorporeal*, such as shares in manufacturing and banking corporations. Such also seems to be the practice in the State of New Hampshire. Smith vs. Buckley, 8 N. H. 428, and we have no doubt such is the general practice in many of the States." The Court then shows the justice and equity of the tax, saying as to non-residents: "Their property should yield its due proportion towards the support of the government which thus protects it." The same doctrine is upheld in 47 Mo. 600; 29 Cal. 533; 40 Mo. 580; 14 Kansas 602. In the Kansas case the Court said in regard to the doctrine of *mobilia sequuntur personam:* "The weight of judicial authority seems to be that for the purposes of taxation the maxim does not fully apply, even *where the property is intangible.*" The same was held in 40 Ill. 198; 2 Duer 110; 3 N. Y. 390. Returning to the Louisiana decisions, we find 44 A. 760, in which the plaintiff was decided to be exempt from taxation on money loaned on interest,

all credits, etc. We pretermit a discussion of this case, which seems to conflict with the principle contended for by us, as we have shown that the later decisions change the doctrine.

The Vermont case presents identically the same points as we will presently show as in the case at bar, the facts in it being that promissory notes held by an agent for a non-resident were taxable in Vermont, under a positive law to that effect. There are in some of the text writers on the subject of taxation, in the notes, cases cited as maintaining the contrary doctrine. A close examination of these cases, however, will show that the decisions in those cases turned on other points.

Such cases have been cited as containing contrary doctrine, such as 11 Allen 268. A close examination of this case shows that it does not sustain the doctrine. The tax sought to be collected in that case was under a special act levying a special tax on stock beloning to "stockholders residing out of the Commonwealth." The Court held it to be unconstitutional and invalid. 1st. Because it did not impose a uniform and proportional tax as required by the Constitution of Massachusetts. 2d. Because in conflicted with Art. 4, §2 of the U. S. Constitution in imposing a greater tax on non-residents than on residents, and denied equal "privileges and immunities of citizens of the several States," thus making a discrimination in favor of the citizens of Massachusetts." The Court further says that the general tax laws would not cover stock held by non-residents, for the reason that shares in corporations being personal property, follow the person and are taxable to the owner in the State where he has his domicile. But there is no where any intimation that a tax might not be laid by special provision of a statute on stock held by non-residents, provided it were uniform and proportional with that laid on residents. In other words'

it declares this particular special statute unconstitutional, and that under the general tax laws there is nothing that does away with the doctrine of *mobilia sequuntur personam*. So in 4 Woods 207, the case turned, 1st. on the question as to whether a municipality could tax its own bonds, and it was decided that it could not as it would impair the obligation of a contract; and 2nd. as to whether under the existing statutes (1883) non-resident holders could be taxed, and it was decided that they could not be. This case presents the same facts as the cases in 41 A., that is that there was no positive law doing away with the doctrine of *mobilia*, etc.

Some of the commentators on taxation cite also 43 Maine 497, which was an action in damages against township assessors for assessing property beyond their jurisdiction in another township. They were held responsible because there was no law which authorized them to do so, and therefore "they could only assess the inhabitants of the town and the property within it." To recur again to 21 Vt. 159. also cited, which lays down the correct doctrine. It was a case were notes due to a non-resident were taxed under a special law of Vermont. The Court, after discussing the doctrine of *mobilia sequuntur personam*, says: "But even if this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact which contravenes the law of his domicile; for if there is, the law of the owner's *domicil* must yield to the law of the State where the property in fact is situated" 11 N. Y. 563 was a case where a non-resident of a town different from that in which he resided in the State was taxed. The Court said: "The statute requires that the owner of personal estate should be assessed for it in town where he resides (1 R. S. 389, §55)." And declared the as-

sessment illegal. In 47 Connecticut 477, a citizen of New York was taxed on personal property in Connecticut. There was no statute under which a tax on a non-resident owner of personal property could be taxed and the Cotrt annulled the tax. 27 Grattan 344 does decide that the State cannot tax railway bonds held by non-residents.

67 Geo. 489 was a case of municipal corporation taxing its own bonds, and thus impairing obligations of its own. The Court decided that it conld not, and further said that pretermitting that question the statute did not authorize snch taxation, and further said "the payment of the debt or interest must be made before the power to tax can be exercised."

106 Ill. 25, also cited, fully sustains our contention. In that case it was sought to tax loans made in Illinois by a non-resident. The Court said: "If the owner is absent, but the credits are in fact here in the hands of an agent for renewal or collection, with the view of re-loaning the money by the agents as a permanent business, they have a *situs* here for the purpose of taxation, and there is jurisdiction over the things. Burroughs on Taxation, 44 *et seq.*" This was under a statute taxing "credits."

In 58 North Western 276, the Court held that certain money, notes, and mortgages belonging to a resident in the State of Wisconsin, but actually in the hands of his agent in the State of South Dakota, were taxable in South Dakota, the Court said: "We are disposed to hold that the situs of personal property owned by a non-resident, but employed in business in the State, and under control and management of an agent, is at the residenee of such agent for the purposes of taxation." The Court quotes the following from Reno on Non-Residents (chapter III) "The general rule is that a non-resident who makes an invest-

ment in a State of the Union holds it subject to all the laws of that State, both present and prospective. His property may therefore be taxed by the State, it may be subject to attachment and execution in accordance with its laws, his title may be divested nnder the Statute of limitations of the State in which his property is situated, and in other ways his property rights may be affected by State Action." The Court also says: "The fiction as to the situs of the property yields to the requirements of justice, and the actual situs is the place where the property is actually situated." The following authorities are cited in support of the doctrine: 1 Desty Taxation, 324; N. W. 249; 7 Fed. 558; Cooley, Taxn. 373; 58 Mo. 295; 73 Ill. 125; 28 N. W. 256.

In Poppleton vs. Yambrill Co., 23 Pacific 253, the tax authorities of the County of Yamhill, in the State of Oregon, undertook to assess and collect a tax, on an amount of money sent by Poppleton to the Territory of Washington, which was there invested in mortgage paper, which notes were held by Poppleton's agent in Washington Territory. The Supreme Court of Oregon sustained the tax, saying "The money, notes and mortgages were undoubtedly subject to taxation in Washington Territory. The right to tax them there is sustained by a line of decisions of the Courts upon the subject, since the one made in Catlin vs. Hull, 21 Vt. 152, down to the present time including Crawford vs. Linn Co. 11 Or. 482, 5 Pac. Rep. 738; and they are undoubtedly correct in principle." The opinion is somewhat lengthy, and the reasoning of the Court is able and conclusive.

We have thus reviewed all of the State decisions which we have been able to find which are cited on this point in the text books on taxation.

Federal Jurisprudence.

We now turn to the decisions of the U. S. Courts on this subject.

In 100 U. S. 499, the doctrine in 8 Howard, 82, is cited with approval, and the case cited says: "The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government, and as laid down by this Court, it may be exercised at the discretion of the State."

In 7 Fed. Rep. 561, the Court said in reference to a tax of the State of Minnesotta on a personal property of a banker, a non-resident, in the hands of an agent in Minnesotta. 2. "That the law of Minnesotta existing in 1877 taxed personal property employed in trade or business in the State, whether the owner was a resident or non-resident. I think the personal property was employed in business within the meaning of the tax law of 1877. The law of 1878 taxed personal property in the State irrespective of ownership, and the tax for this year was legally imposed."

In 19 Fed. Rep. 360, the Court held in a case of a State tax under a special law, taxing mortgage notes owned by non-residents, which notes were within the State, the Court held (syllabus) "The State has power, so long as it does not trench upon the Constitution of the United States, to tax all persons, property and business within its jurisdiction or reach; and whether any person, property or business is so within its jurisdiction is not a federal question, and must be determined by the State itself."

In 22 Federal Reporter, 602, it was held that under the Statute of California intangible, movable property of a non-resident was not taxable in California, the Court saying, on p. 604: "The interest of defendant in the capital stock of the corporation being incorporeal and intangible, and having no situs apart from the person of the owner, he being a non-resident, without the jurisdiction of the State and the tangible property of the corporation, of which the capital stock is the representative, being also situated outside of the State, it *was not without some express constitutional or statutory provision making it so, if any sunh valid provision there could be, subject to the jurisdiction of the State, or to taxation within the State, through the medium of the shares of stock in the corporation; and we have seen that the provisions of the Constitution and Statute do not reach the case, as alleged in the complaint, there being no such express, unqualified provisions.*" The italics are our own.

In 100 U. S. 496, the question involved was as to the right of a State to tax a debt due to one of its own citizens by a non-resident, and the Court said it was not a subject which could be reviewed by the Federal Courts. In it the general doctrine of the situs of intangible property for purposes of taxation being that of the creditor is discussed, but there is no allusion to the exact principle involved herein.

In 169 U. S. 431, the question being presented therein as to the unconstitutionality of the tax law of Oregon taxing mortgages on real estate situated in Oregon, but held by parties resident in California, in which latter State the notes actually were in the hands of the owner, this Honorable Court said: "Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable and

by way of security for the debt, *it appears to us to be clear upon the principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated without contravening any provision of the Constitution of the United States.*" The italicized clause is so marked by us.

In 60 Federal Reporter 31, it was held (syllabus) that "the rights conferred by a real estate mortgage are, in their very nature, rights attached to land, and hence such mortgages may properly be made taxable in the State and county where the lands lie, without regard to the residence of the owners of the mortgages, or to the fact that the instruments themselves are in possession of the owners."

In his brief the plaintiff and appellee in this case has laid great stress upon the decision of this Honorable Court on 15 Wallace, page 300, State tax on foreign held bonds. We do not think that that case has any bearing on the point at issue herein.

In 19 Federal Reporter, page 369, the Court said:

"And the case of State tax on foreign held bonds, 15 Wallace, 300, cited, and also much relied on by Counsel for the plaintiff, only decides that a State law which comes between the foreign lender and the local borrower, and compels the latter to pay a portion of the interest due the former on his debt, as taxes to the State, is void, because it impairs the obligation of a contract between the parties. And the same ruling could as well have been made on the ground if they had both been citizens of the State seeking to impose the tax. The case was before the Court on a writ of error to the judgment of the Supreme Court of the State of Pennsylvania, and

this was the only federal question in the case, and therefore the only one determined by it."

Besides this, in all the State tax cases on shares of a bank held by foreign shareholders, this Honorable Court has sustained the tax, thereby overruling any such interpretation as our opponents seem to place upon that decision.

In 34 Fed. Rep., page 356, where taxes on $200,000 mortgages held by a Pennsylvania corporation for the benefit of a non-resident of the State of Pennsylvania were levied by the State, the Court said:

"Has the State the power to impose this tax? In several of the State Supreme Courts this question has been the subject of consideration, and it has been uniformly held that property is taxable by the States as against the trustee at his place of residence, where the cestuis qne trustent are non-residents. People vs. Assessors, 40 N. Y. 154; Latrobe vs. Baltimore, 19 M. D. 13; Calliny Hall, 31 Vt. 153; Dorr vs. Boston, 6 Gray 131. In Pennsylvania, since the act of 1856, the decisions of the Supreme Court are of similar effect. Thus in Borough of Carlisle vs. Marshall, 36 Pa. St. 401, where the cestuis que trustent were non-residents, and the trustee a resident of the State, the Court declares that the fund in the hands of the trustee was taxable for State purposes at his place of reaidence under the act of 1846. See also West Chester vs. Darlington, 38 Pa. St. 137. In the Supreme Court of the United States no case has been decided involving the question presented here. Corelative questions have arisen, and have been adjudicated, but they do not furnish any authoritative guide to the determination of this case. State Tax on Foreign Held Bonds Cases, 15 Wall 300, is the leading case of its class. By a law of the State of Pennsylvania, a tax was imposed upon bonds issued by a

Pennsylvania railroad corporation, and owned and held by non-residents. It is to be noted that the legal and beneficial ownership of the subject of taxation were both in another State than Pennsylvania, determinable by the residence of each owner, and hence was beyond the jurisdiction of the latter. The Court held that the law was invalid, as impairing the obligation of a contract, between the corporation and its creditors, and that as the situs of the property taxes was outside of the State, it was beyond her jurisdiction. Speaking of the power of taxation, the Court says: 'It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution the power and the mode, form and extent of taxation is unlimited, when the subject to which it applies are within her jurisdiction.' In the present case, the trust property in question was transferred to the trustee, a Pennsylvenia corporation, by two deeds of trust, and by the will of Samuel Harlan, to be held for the benefit of his daughter, Mrs. Price, during life, and then to be paid to her appointees or her children. The legal title and ownership of the property was thus vested in the Trust Company, and is under its control, subject only to the terms of the trust. The trustee is domiciled in the State of Pennsylvania, as a creature of its laws, and hence the situs of the property is in that State, where the trustee resides. It is thus in her own jurisdiction, and within the reach of her taxing power. The bill is dismissed at the cost of the complainants."

We cannot better close this brief on this point than by quoting the following decision from the 141 U. S., page 18.

Mr. Justice Gray, as the organ of the Court, delivered the following opinion :

"Upon this writ of error whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of she highest Court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois in which it was incorporated, and had its principal place of business.

No general principles of law are better settled; or more fundamental, than that the legislative power of every State extends to all property within its borders, and only so far as the comity to that State allows, can such property be affected by the law of any other State. The old rule expressed in the old *maxim mobila sequunntur personam*, by which personal property was regarded as subject to the law of the owners' domicile, grew up in the middle ages, when movable property consisted of gold and jewels, which could be easily carried from place to place, or secreted in spots known only to himself. In modern times since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used. Green vs. Van Buskirk, 73 U. S., 5 Wall 307 (18-599) and 74 U. S., 7 Wall. 139 (19-109); Hervey vs. Rhode Island Locomotive Works, 83 U. S. 664 (23-109); Harkness vs. Russell. 118 U. S. 663,679 (30-385,290); Walworth vs. Harris, 139 U. S. 355 (32-713); Story on Conflict of Laws, 550 ; Wharton

on Conflict of Laws, 297-311. As observed by Mr. Justice Story, in his commentaries just cited. 'Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' For the purpose of taxation as has been repeatedly affirmed by this Court, personal property may be separated from its owner, and he may be taxed on its account, at the place where it is, although not the place of the owners' domicile, and even if he is not a citizen or resident of the State which imposes the tax. Lane County vs. Oregon, 74 U. S., 7 Wall 71-77 (19-101-104); Cleveland, P. & A. R. Co. vs. Pennsylvania, 82 U. S., 15 Wall. 300, 323, 324, 328 (21-179-188-189); Union Pc. R. R. Co. vs. Penniston, 88 U. S., 18 Wall 5, 29 (22-787-791); Tappan vs. National Bank, 86 U. S., 19 Wall. 490, 499 (22-189-193); State Ratlroad Tax Cases, 92 U. S., 575, 607, 608 (23-663-671); Brown vs. Houston, 114 U. S., 622 (28-257); Coe vs. Erroll, 116 U. S., 517, 824 (29-715-717); Marye vs. Balttmore & O. R. Co. 127 U. S.; 117, 123 (32-94-96.

It is equally well settled that there is nothing in the Consti. tution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce, like other personal property within its jurisdiction. Delaware Railroad Tax, 85 U. S. 18 Wall. 206, 232 (22-888, 896); Western Union Tel. Co. vs. Texas, 105, U. S. 460, 464 (26-1067, 1068); Gloucester Ferry Co. vs. Pennsylvani, 114 U. S. 196, 206, 211 (29-188, 163, 164); Western Union

Tel. Co. vs. Massachussets, 125 U. S. 530, 549 (31-790, 793); Marye vs. Baltimore & O. R. Co., 127, 124 (32-94, 96); Lesoup vs. Port of Mobile, 127 U. S. 640, 649 (3E-311, 314)."

Comptainant asserts in her bill (4th R. p, 2) that the minors McCan inherited $228,271.60 in bonds of the City of New Orleans and State of Louisiana, which she declares under the law are not taxable, and in the 10th clause of her bill she pretends that these bonds are included in the $800,000 assessments, and that such inclusion is an attempt to violate the Constitution of the United States by unfairing the obligation of contracts.

We call your Honors' attention to the copy of assessment roll found intnrleaved at page 26 of the Record—You will find a column numbered 5, which, under the caption of credits, bills receivable, etc., charges an assessment of $800,000, and in the same document you will find a column numbered 16, under the caption "bonds, etc." under which head nothing is assessed at all.

Therefore, the evidence furnished by the complainant herself, proves conclusively she was not assessed at all as owning any bonds of any description. Consequently, there is no question here involved of any taxation of non-taxable bonds. Simply and solely, the question is, is the assessment of $800,000 for credits, bills receivable, etc., correct or not?

This resolves itself into two considerations, as raised by complainant in her brief, and, in a slight measure in her pleadings,

First, is not the whole $800,000 assessment illegal, because, as complainants reside outside of Louisiana, their personal property, though situated permanently in Louisiana, is taxable only at the owners' domicile.

Second, if it is taxable in Louisiana, then should not the amount of assessment be reduced by deducting therefrom the $228,271.60 of non-taxable bonds.

As to the first proposition, we have discussed that at length in this brief, and therefore will now address ourselves to the second:

The law of Louisiana, relative to assessments, as found in Act 106 of the Louisiana Legislature passed in 1890, the portion which is relative thereto, we quote hereinafter.

The method of assessment in Louisiana is; first, the Assessors send to every taxpayer a blank form for the taxpayer to fill out, giving valuation of his property, etc. If the taxpayer fills in the amount, the Assessors, if they approve his valuation, accept same as the basis of their assessment. If on the other hand the taxpayer fails to send in this form, then the Assessors use their own discretion as to the valuation of his property. In either event the valuation is subject to correction. The correction is as follows:

The Assessors having completed the rolls, advertise in the newspapers that the assessment rolls for the ensuing year are ready for examination. This advertisement is inserted about the 1st of March and the rolls remain exposed to public examination for twenty days.

During these twenty days any property owner who questions the valuation of his property, appears before them and makes an application for its correction. If the Board of Assessors (for the parish of where the complainant's property was assessed) refuses this application, then the taxpayer can apply to the City Council of New Orleans for a correction, and if the the City Council refuses to correct, then the taxpayer has recourse to the Courts. But the jurisprudence of this State is that the application to the Courts is in the nature of an appeal from the decision of the Board of Assessors and City Council, and consequently unless application was made to these two bodies and

refused by them the taxpayer is not allowed to appeal to the Courts for relief. This doctrine settled by the Supreme Court of Louisiana in the case of Shattuck & Aoffman vs. City of New Orleans et al., in 1887, reported in 39 An. p. 206, wherein the Court said:

"The taxpayer before bringing suit for the reduction or correction of an essessment, must as a condition precedent, make the preliminary opposition thereto and application for redress provided for by law."

This is the leading case on the subject in Louisiana and has been cited approvingly scores of times since it original rendition. There is a distinction drawu by the Courts of Louisiana between the application for a reduction or correction of an assessment and the entire cancellation of an assessment. The former application for reduction and correction cannot be brought into Court, unless as is stated in the Shattuck & Hoffman case, application has been previously made to the Board of Assessors and City Council for relief.

But in the second class, where an application is for an entire cancellation of an assessment, no previous application to the revising bodies is required. See Morgan's Louisiana T. & R. S. S. Co., vs. Precot, Sheriff, et als. 50 La. An page 737. Wherein it is cited:—

"A distinction is to be drawn between suits to correct an assessment and suits which go to the inherent validity of an assessment and to the illegality of the tax based thereon." "Those of the first class mnst be instituted within the time fixed by the statute. Those of the latter class are not subject to such time limit."

This present case, we submit to your Honors is not an application for the reduction or correction of an assessments; it is

one for an entire cancellation. The prayer of the complainant (See transcript page 6) is:

"That the Board of Assessors for the Parish of Orleans be condemned and ordered to erase and cancel from the assessment rolls of 1896 the assessment against the estate of D. C. McCan, on the rolls of the third assessment district, square 19, of moneys loaned, advanced, etc., $800,000. and cash on hand, bills receivable, etc., $15,000. and that said assessment be declased illegal, null and void."

There is no prayer for any reduction, neither in the precedent application made by plaintiff to the Board of Assessors for the parish of Orleans (printed at page 28 of the Transcript) and to the City Council of New Orleans (printed at page 31 of the Transcript) is there any prayer for a reduction or correction in any shape. Consequently she should not be heard here to urge any application for a reduction of her assessment. This reduces the controversy to the question of the illegality of the entire assessment of $800,000. A suit for cancellation can not be converted into a suit for reduction. The applicant for cancellation must stand or fall as such.

An examination of the application made to the City Council and to the Board of Assessors will show that no demand was made on them for a change of the assessment on the $800,000, monies loaned, etc., from the estate of D. C. McCan to the names of the minors represented by the complainant. There was no assertion made that the complainant desired the name of the assessment on the personal property changed from the estate of McCan to the minors Stemple. On the contrary, while the application was made to have the real estate assessment changed to the names of the minors, yet acquiescence was had in the assessment in the name of the estate on the

personal property to the extent of paying the taxes due for 1897 on the estate of D. C. McCan on such an assessment, (see tax bill printed at page 33 of the Transcript) and on that tax bill it is stated that this personal property was located at the corner of Coliseum and Third streets, New Orleans, which was at that time the residence of the owners of the property.

We hold that their payment of this tax bill, and their failure to make any claim or request on the City Council and Board of Assessors to change the name of the assessment on their personal property, constituted an acquiescence on their part in the correctness of the assessment is so far as the name was concerned.

And, as stated before, this resolves the case to the question of whether or not the entire assessment is illegal, null and void, because of the claim of complainant that the residence of her wards, the owners of the property is, or was outside of the State of Louisiana, and as this branch of the case has formed the burden of the other portion of our brief, it will not be repeated here.

We respectfully submit that the assessment herein attacked should be maintained in its entirety.

All of which is respectfully submitted,

J. J. McLOUGHLIN,
Solicitor for City of New Orleans.

F. C. ZACHARIE,
Solicitor for Tax Collector and Board of Assessors.